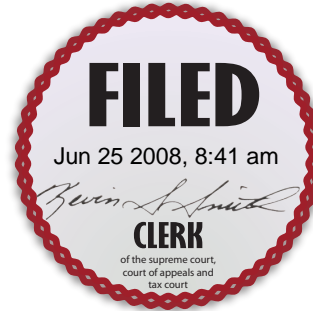


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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PAUL MAYES,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0802-CR-100

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Patricia J. Gifford, Judge  
Cause No. 49G04-0509-MR-152924

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**June 25, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Paul Mayes (“Mayes”) was convicted in Marion Superior Court of murder and sentenced to a term of fifty-five years. Mayes appeals and argues the following:

- I. Whether the trial court erred in its denial of Mayes’s manslaughter instruction;
- II. Whether the State’s closing argument constituted prosecutorial misconduct and fundamental error;
- III. Whether the trial court abused its discretion when it excluded evidence that allegedly supported an alternative theory of the case;
- IV. Whether the State violated Indiana Trial Rule 26 regarding its duty to supplement its discovery responses; and
- V. Whether the evidence is sufficient to support Mayes’s conviction for murder.

We affirm.

### **Facts and Procedural History**

On Tuesday, August 9, 2005, at around 2 a.m., Summer Sheese (“Sheese”) left the Indianapolis motel room where she had been staying. She told a friend that she would be right back, left on foot, and took nothing with her. Shortly thereafter, Sheese met Mayes. The two “partied” in Mayes’s Jeep near a vacant lot near Mayes’s cousin’s house. Mayes’s cousin, Darren Mayes (“Darren”), lived at 1733 North Alvord Street in Indianapolis. Mayes and Sheese had sexual intercourse. Mayes claimed that they then fell asleep.

Mayes claims that when he awoke he found Sheese’s dead body next to his Jeep. He then placed the body in his car and drove around until he reached his grandmother’s house. There, Mayes placed Sheese’s body in the trunk of his mother’s inoperable Toyota Corolla.

Around 5 a.m., Mayes went to his grandmother's house to ask for money. At the time, he was clean and wearing hospital scrubs because he worked as a physical therapy assistant. Later that morning, around 10 a.m., Mayes drove back to his grandmother's home. She noted that Mayes's face was "all red" and that it appeared that he had been in a fight. Mayes initially told his grandmother that he had fallen down a hill but then admitted to getting into a fight. He was dirty, and his hand was swollen. Mayes took aspirin for the pain. He then called his girlfriend, Jennifer Foster, and told her he was tired and that his arm hurt. He did not go to work that day but laid down in a back bedroom of his grandmother's house. He spent Tuesday night at Foster's house. His forearm was swollen.

On Wednesday, August 10th, at 7:15 a.m., Mayes reported to work. At 9:00 a.m., Mayes's uncle noted a pool of reddish liquid next to the rear of the Toyota Corolla that was used by Mayes and was parked in Hazel's driveway. He opened the trunk and found Sheese's body. He called the police. Sheese was fully clothed but was missing one Reebok tennis shoe.

Later that same day, Melissa Campbell, mother of Mayes's two children, heard about the body in the Toyota from Foster and located Mayes at his place of work. Mayes told Campbell that he had met Sheese, they had partied together, had sex, and fallen asleep in the Jeep. Mayes told her that when he awoke, he found Sheese's body outside of the Jeep. He put the body in his Jeep then drove back to his grandmother's house. Mayes spoke to Detective Sergeant Claire Hochman ("Detective Hochman") on

Campbell's cell phone and told Detective Hochman that he would be returning to his grandmother's house. Mayes left his work but never arrived at the house.

The police broadcast information regarding Mayes's description, a description of his Jeep, and the area of 1700 Alvord that afternoon. A police officer saw Mayes arrive at his cousin's house. Mayes was wearing hospital scrubs. Mayes was arrested around 8:15 p.m. The house was searched, but no blood or evidence of a murder was discovered. Mayes did have a swollen right hand and right elbow. Detective Hochman returned the next day with a search warrant.

An autopsy of Sheese revealed that she had died between twenty-four and thirty-six hours before her body was discovered on Wednesday morning. She died as a result of strangulation, stab wounds, and multiple blunt force injuries.

Discovered in the trunk of the Toyota along with Sheese's body were stained hospital scrubs, a blanket, and a latex glove. Sheese's blood was found on the hospital scrubs and on the steering wheel of the Jeep. Mayes's blood was found on the Jeep's driver's side seat back.

On August 18, Mayes told Detective Hochman that he knew where Sheese had been "harmed." Tr. p. 458. Mayes directed the police to a vacant lot behind 1717 North Alvord. Behind a boarded house, the police found Sheese's earring, her missing shoe, and two empty condom wrappers.

Soon thereafter, the State charged Mayes with murder. The four-day jury trial began on May 29, 2007. In Mayes's opening statement, he admitted to picking up Sheese, "partying" with her, having sex with her, falling asleep, waking up to find her

dead body outside of the vehicle, driving her body to his grandmother's house, and placing the body in the trunk of the Toyota. Mayes attempted to establish that his cousin Darren committed the murder and sought to admit Darren's criminal history, which the trial court denied. During the trial, Detective Hochman was questioned. Prior to or during the cross-examination of the detective, the State disclosed that her answers to questions in her deposition concerning a search of 1717 North Alvord and the date she returned to 1733 North Alvord to search were inaccurate. Mayes completed the cross-examination without objection or request a mistrial.

Mayes requested a voluntary manslaughter instruction that the trial court denied because of a lack of evidence of sudden heat. The jury found Mayes guilty of murder and the trial court sentenced Mayes to fifty-five years.

Mayes filed a motion to correct error on the discovery issue related to Detective Hochman's deposition. The trial court denied Mayes's motion. Mayes appeals.

## **Discussion and Decision**

### **I. Jury Instruction**

Mayes argues that the trial court abused its discretion when it denied his proposed voluntary manslaughter instruction. The trial court has within its sound discretion the manner of instructing a jury, and we review its decision thereon only for an abuse of that discretion. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). When a party seeks an instruction on an alleged lesser-included offense of the crime charged, the court must use a three-step analysis to determine the appropriateness of such an instruction. Wright v. State, 658 N.E.2d 563, 566 (Ind. 1995). First, the court must compare the

statute regarding the crime charged with that of the alleged lesser-included charge. If the alleged lesser-included charge may be established by proof of the same or proof of less than the same elements or if the only difference is a lesser proof of culpability, then the alleged lesser-included charge is inherently included. Id.

Second, if the alleged lesser-included offense is not inherently included in the charged crime, then the trial court must compare the statute of the alleged lesser-included offense with the allegations in the charging instrument. Id. at 567. If all the elements of the alleged lesser-included offense are covered by the allegations in the charging instrument, then the alleged lesser-included charge is factually included. Id.

Third, if the charge is determined to be a lesser-included one, then the trial court must determine if a serious evidentiary dispute over the distinguishing element or elements. If it is possible for the jury to find the lesser, but not the greater, offense, then the trial court must instruct the jury on both offenses. Id.

As noted in Watts v. State, 885 N.E.2d 1228, 1232, (Ind. 2008), voluntary manslaughter is a lesser-included offense to murder. The only question left is to determine if substantial evidence was presented concerning the distinguishing element, namely sudden heat. Sudden heat is “anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary man; it prevents deliberation and premeditation, excludes malice, and renders a person incapable of cool reflection.” McBroom v. State, 530 N.E.2d 725, 728 (Ind. 1988). In order “[t]o establish that a defendant acted in sudden heat, the defendant must show ‘sufficient provocation to engender . . . passion.’”

Clark v. State, 834 N.E.2d 153, 158 (Ind. Ct. App. 2005) (quoting Johnson v. State, 518 N.E.2d 1073, 1077 (Ind. 1988)).

Mayes attempts to argue that the State's closing argument set forth the evidentiary support for sudden heat. However, neither Mayes nor the State presented evidence that showed what provocation led to Sheese's death. "In order to inject the issue at all the defendant must point to some evidence supporting sudden heat[.]" Jackson v. State, 709 N.E.2d 326, 328 (Ind. 1999). Mayes has failed to do this. Therefore, the trial court did not abuse its discretion when it denied Mayes's proposed voluntary manslaughter instruction.

## **II. Prosecutorial Misconduct**

Mayes argues that the State committed prosecutorial misconduct when it allegedly argued the elements of voluntary manslaughter despite having no instruction on voluntary manslaughter. To preserve an issue regarding the closing argument, Mayes was required to contemporaneously object to the statement and requested an admonishment. "Failure to request an admonishment results in a waiver of the issue for appellate review." Flowers v. State, 738 N.E.2d 1051, 1058 (Ind. 2000). Mayes failed to object to the alleged offending statements, therefore the issue is waived.

However, Mayes attempts to avoid this waiver by claiming that the statement was fundamental error. Prosecutorial misconduct may constitute fundamental error, but the misconduct must be so prejudicial to the defendant's rights as to make a fair trial impossible. Gasper v. State, 833 N.E.2d 1036, 1042 (Ind. Ct. App. 2005), trans. denied.

A prosecutor must confine closing argument to the evidence presented in the record but may argue both the law and facts and conclusions based on his or her analysis of the evidence. Id. The statements referred to by Mayes are merely conclusions based on the facts presented at trial. The State's statements regarding "what set [Paul] off" and that "he didn't know how [Mayes and Sheese] got into it" reflect a lack of evidence, if anything. Tr. p. 586. The statements were the State's recognition that it was unable to show what occurred immediately before the murder occurred. Additionally, the State's closing argument regarding the way Mayes had killed Sheese reflects the evidence presented on how Sheese was killed. The State did not argue that voluntary manslaughter occurred; in fact it recognized that it did not know what caused the murder. Not only did the State not commit misconduct, the statements could have had no impermissible persuasive effect on the jury. Based on the facts and circumstances, we conclude that the State did not commit prosecutorial misconduct, much less fundamental error.

### **III. Exclusion of Evidence**

The admission and exclusion of evidence lies within the sound discretion of the trial court; therefore we review admission of testimony for abuse of that discretion. State v. Lloyd, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003). Such an abuse occurs when the "decision is clearly against the logic and effect of the facts and circumstances." Id.

Mayes argues that the trial court abused its discretion when it denied his request to admit evidence purportedly linking a third party to the murder of Sheese. Specifically, Mayes sought to enter into evidence two police reports involving Darren that purport to contain incidents of beating and choking women. None of the incidents involved Sheese

and none resulted in the death of the victim. Mayes believes that this is specific factual evidence that Darren is a possible other suspect in Sheese's murder.

The two incidents related by Mayes include one where Darren assaulted the female victim by allegedly putting his hands around her neck and dragging her out of a house. The second incident involved an ex-girlfriend of Darren. Darren allegedly grabbed her cell phone as she tried to call 911 and broke the cell phone. However, the ex-girlfriend was not injured.<sup>1</sup>

Mayes attempted to use the criminal history of Darren to prove the identity of an alternative suspect. The trial court determined that this information was inadmissible under Indiana Evidence Rule 404(b) that states:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Defendants may offer evidence of another's prior bad acts as proof that the other acted in conformity therewith but only if a Rule 404(b) exception applies. Garland v. State, 788 N.E.2d 425, 430 (Ind. 2003). At trial and in this appeal, Mayes argues that the criminal history evidence is being presented under the identity exceptions of Rule 404(b).

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<sup>1</sup> We would note that Mayes, in his attempt to write persuasively, has exaggerated the criminal history of Darren. While Mayes states that there are several incidents of beating and choking women, Mayes provided only one police report that involved beating and choking a woman. Apparently, in Mayes's zealous advocacy of his position, he overstated the significance of Darren's criminal history.

As noted in Garland, the test for the identity exception is whether the crimes are strikingly similar. Id. at 431.

On this point, the question is, “Are these crimes so strikingly similar that one can say with reasonable certainty that one and the same person committed them?” Davis v. State, 598 N.E.2d 1041, 1047, n. 2 (Ind. 1993). Darren did not commit murder and the circumstances of the offenses are not similar to those present here. We cannot say that the crimes are so similar that one could say with reasonable certainty that Darren committed them both. Sheese’s killing was not a “signature crime.” Therefore, the trial court did not abuse its discretion when it refused to admit evidence of Darren’s criminal history.

#### **IV. Duty to Supplement Discovery**

Mayes next argues that the State violated Indiana Trial Rule 26 when it failed to advise him in a timely manner of changes in the testimony of Detective Hochman. As a general rule, a party must make a contemporaneous objection to evidence offered into the record. Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003). A party that fails to timely object or timely file a motion to strike waives their right to exclude evidence at trial and their right to appeal the admission of the evidence. Id. “In failing to make a timely objection or motion, the party is, in effect, acquiescing in the admission of the evidence.” Reed v. Dillon, 566 N.E.2d 585, 588 (Ind. Ct. App. 1991).

Here, not only did Mayes fail to object to the changes in Detective Hochman’s testimony but in fact, Mayes continued to cross-examine Detective Hochman and used the changes in testimony to impeach her. The State cites Everage v. Northern Indiana

Public Service Company, 825 N.E.2d 941 (Ind. Ct. App. 2005), for support that a party waives its argument regarding a discovery violation when the party fails to object or request a continuance. In Everage, trial counsel objected during trial albeit after a weekend break and this was deemed insufficient to preserve the issue for appeal. Id. Mayes presented this issue for the first time in his Motion to Correct Error. Mayes did not object in a timely manner and has waived his objection to the perceived discovery violation.

Additionally, Mayes has failed to provide this court with an adequate record concerning the motion to correct error hearing. Indiana Appellate Rule 9(F)(4) governs this case. Mayes, as the appellant, has the responsibility to support his claim by presenting a sufficient record so that this court may conduct an intelligent review of the issues. See Miller v. State, 753 N.E.2d 1284, 1287 (Ind. 2001). The Indiana Supreme Court has “held that without submitting a complete record of the issues for which an appellant claims error, the appellant waives the right to appellate review.” Id.; see also Lightcap v. State, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007) (finding defendant’s sufficiency of the evidence argument waived because he “failed to provide this court with a copy of the testimony and evidence presented at his criminal trial upon which the trial court based its decision to revoke his probation”).

Mayes argues that the State failed to seasonably supplement discovery. Such an issue implicates factual issues of the State’s knowledge, efforts to supplement and timeliness of supplementing. Presumably, such evidence was heard at the motion to correct error hearing, yet Mayes has failed to provide a record of that hearing. We have

no means to review the evidence that the trial court based its decision on. As it is the duty of the appellant, Mayes, to present an adequate record clearly showing the alleged error, his failure to do so results in the waiver of this issue as well.

### **Sufficiency of Evidence**

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. A murder conviction may be based entirely on circumstantial evidence. Franklin v. State, 715 N.E.2d 1237, 1241 (Ind. 1999). If inferences may be reasonably drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt then the circumstantial evidence will be sufficient. Id.

Mayes argues that although he had the opportunity to kill Sheese, mere opportunity is insufficient to support a finding of guilt beyond a reasonable doubt. However, the evidence presented at trial showed that Mayes had more than a mere opportunity to kill Sheese. The jury was presented with the following evidence: Mayes picked up Sheese in his Jeep, “partied” with Sheese, had sex with her, and then fell asleep with Sheese. Mayes claims to have awakened to find Sheese brutally beaten, choked and stabbed body next to his Jeep. At this point, Mayes loaded Sheese’s body into his vehicle

and drove it to his grandmother's house where he hid the body in the trunk of an inoperable Toyota owned by his mother.

Mayes seems to admit to the events surrounding the murder, disputing only whether or not he murdered Sheese. Mayes never contacted the police to report a murder. Instead he attempted to avoid the police. When he was arrested, he pointed the police to the crime scene where the police found Sheese's missing earring and shoe. With this evidence and Mayes's injured hand, the jury could easily find that Mayes murdered Sheese.

Mayes argues that the police did not adequately investigate. Mayes brought out the perceived inadequacies during trial and the jury still determined that he was guilty. Despite protests to the contrary, Mayes is asking us to reweigh the evidence that we will not do.

Based on the facts and circumstances of the case, any reasonable jury could determine that Mayes knowingly or intentionally killed Sheese.

### **Conclusion**

We conclude that the trial court did not abuse its discretion when it refused to give a voluntary manslaughter jury instruction and excluded evidence relating to Darren's criminal history. Mayes waived the issue of prosecutorial misconduct by failing to contemporaneously object, and that no fundamental error occurred regarding the prosecutor's conduct at issue. Mayes also waived his claim regarding discovery violations by failing to provide this court with an adequate record. The evidence was sufficient to support Mayes's murder conviction.

Affirmed.

MAY, J., and VAIDIK, J., concur.